No. 83038-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JERRY D. SMITH, as Personal Representative of the ESTATE OF BRENDA L. SMITH, Deceased, and on behalf of JERRY D. SMITH, RICHONA HILL, JEREMIAH HILL, and the ESTATE OF BRENDA L. SMITH,

Plaintiffs/Petitioners,

vs.

ORTHOPEDICS INTERNATIONAL LTD., P.S.; and PAUL SCHWAEGLER, M.D.,

Defendants/Respondents.

BRIEF OF AMICUS CURIAE WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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On Behalf of
Washington State Association
for Justice Foundation

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation under Washington law, and a supporting organization to the Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of the Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to the Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. Both WSTLA and WSTLA Foundation name changes were effective January 1, 2009. WSAJ Foundation previously filed an amicus curiae memorandum with the Court supporting review in this case.[1]

WSAJ Foundation has an interest in the rights of persons seeking legal redress under the civil justice system, including an interest in the rules governing the conduct of the parties during the litigation process.[2]

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[1] The 10-page WSAJ Foundation amicus curiae memorandum was limited to describing the Court's holding and analysis in Loudon v. Mhyre, 110 Wn.2d 675, 756 P.2d 138 (1988), and urging that Smith's petition for review involved issues of substantial public interest under RAP 13.4(b)(4). See "Washington State Association for Justice Foundation Amicus Curiae Memorandum in Support of Review." The amicus curiae memorandum did not present argument on the merits of these issues.

[2] Carol N. Johnston is a member of the law firm representing petitioner Jerry D. Smith, et al., Otorowski Johnston Diamond & Golden, LLC, and is also currently a member of the WSAJ Foundation Amicus Committee. Maria S. Diamond is a member of the same law firm and is also currently a member of the Board of Directors of WSAJ Foundation. Neither Ms. Johnston nor Ms. Diamond have participated in the Committee's determination to file this amicus curiae brief or in the preparation of the brief.

II. INTRODUCTION AND STATEMENT OF THE CASE

Jerry Smith, as surviving spouse of Brenda Smith and Personal Representative of her estate (Smith), brought this wrongful death and survival action against Dr. Paul Schwaegler and his employer, Orthopedics International Ltd., P.S. (Orthopedics International). The action is based on a claim of medical negligence resulting in injuries to Brenda Smith, and, ultimately, her death. The underlying facts are drawn from the Court of Appeals opinion and the briefing of the parties. See Smith v. Orthopedics Int'l, Ltd., P.S., 149 Wn.App. 337, 203 P.3d 1066, *review granted,* 166 Wn.2d 1024 (2009); Smith Br. at 2-20; Orthopedics International Br. at 2-32; Smith Pet. for Rev. at 2-10; Orthopedics International Ans. to Pet. for Rev. at 2-12.

For purposes of this amicus curiae brief, the following facts are relevant: During discovery in this case, Orthopedics International disclosed that it intended to call as a witness one of Brenda Smith's treating physicians, Dr. Kaj Johansen, who is not a party defendant in the case.[3] His deposition was taken by Smith. At trial, no motions in limine were made restricting witness access to the trial proceedings or to information disclosed during the course of the proceedings.

[3] There is no indication in the briefing that Dr. Johansen was an employee of Orthopedics International.

During trial, Smith learned that a lawyer for Orthopedics International had shared information with legal counsel for Dr. Johansen before his scheduled testimony. This information consisted of the trial testimony of one of Smith's experts, the text of Smith's trial brief, and defense counsel's notes outlining the forthcoming direct examination of Dr. Johansen as a witness for Orthopedics International. Dr. Johansen's lawyer passed on to him the trial testimony of the Smith expert and the Smith trial brief. Defense counsel's outline for direct examination was apparently not given to Dr. Johansen by his lawyer. Dr. Johansen testified at trial and the jury returned a defense verdict.

During trial, Smith discovered these events occurred and moved to strike Dr. Johansen's testimony and for a mistrial, contending this contact violated the ex parte contact prohibition established in Loudon v. Mhyre, 110 Wn.2d 675, 756 P.2d 138 (1988). As a result, over the weekend the trial court conducted a telephone conference with counsel, including additional counsel for the parties and Dr. Johansen's counsel, and a court hearing on the matter when trial resumed the following week. Smith's motions were denied, although the trial court offered Smith an opportunity to recall Dr. Johansen to cross-examine him regarding the documents he had received from defense counsel. Smith declined this invitation. The trial court also instructed the jury that Dr. Johansen had been given the

above information without Smith's knowledge. After a defense verdict, Smith unsuccessfully sought a new trial on the same grounds as the motions to strike and for mistrial.[4]

Smith appealed to the Court of Appeals, Division I, which affirmed, concluding that the trial court had not abused its discretion in denying Smith's motions to strike Dr. Johansen's testimony and for mistrial and new trial. The Court of Appeals held in pertinent part:

> After *Loudon* counsel may not interview a plaintiff's nonparty treating physician privately but must instead utilize the statutorily recognized methods of discovery as set forth in the civil rules. Essentially, that is what occurred here. Dr. Johansen was deposed and his testimony at trial tracked the information obtained during that deposition. Without more, the transmittal of public documents to a fact witness who is also a treating physician does not fall within the ambit of *Loudon.* Indeed, given the public nature of the documents, excluding the notes, we do not see how it can be.

Smith, 149 Wn.App. at 342. The court found it significant that defense counsel did not seek or solicit information from Dr. Johansen, and that, in any event, there was no showing of actual prejudice to Smith as a result of the ex parte contact. See id. at 342-43. The Court of Appeals concluded that "[w]hile the better course of conduct would have been to copy

[4] The details of these events are described more fully at Smith Br. at 14-19; Orthopedics International Br. at 26-30; Smith Pet. for Rev. at 7-10; Orthopedics International Ans. to Pet. for Rev. at 3, 9-12.

opposing counsel on the e-mails, the transmission of the documents does not constitute a *Loudon* violation." Id. at 343.

Smith's petition for review was granted by this Court.

III. ISSUES PRESENTED

1.) Does the Loudon prohibition on ex parte contacts apply to defense counsel's contact with a treating physician through that physician's lawyer?

2.) If so, what is the proper remedy or sanction for such a violation?

IV. SUMMARY OF ARGUMENT

Overview

The Loudon prohibition on unauthorized ex parte contact by defense counsel with a treating physician includes defense counsel's contact through the physician's lawyer. Such contact unduly threatens the physician-patient relationship and should be deemed prejudicial to plaintiff's interests.

As a remedy or sanction, at minimum the defense should be prohibited from using the testimony of the treating physician for its purposes. The imposition of additional remedies or sanctions should be dictated by the facts and circumstances of the particular case.

Re: Scope of Loudon Rule

Loudon prohibits *any* ex parte contact. It is a bright line rule. The rule must include ex parte contact through an intermediary in order to fully

protect the physician-patient relationship. Orthopedics International's argument that the contact in this case is just "lawyers acting as lawyers" disregards the fact that *Smith's* lawyer was not involved and thus unable to minimize the threat to Smith's interests.

Re: Remedy for Loudon Rule Violation

Any ex parte contact should be deemed prejudicial, given the potential for grave harm to the physician-patient relationship. This relationship exists outside of the litigation context, and may well endure long after the particular legal controversy comes to an end. At minimum, the remedy or sanction for a Loudon rule violation should be to prohibit the defense from using the contacted physician's testimony. Anything less will not adequately discourage such misconduct.

The alternative, case-by-case assessment of prejudice by the trial court, unduly taxes its resources. This Court declined to approve a similar time-consuming process when it established the Loudon rule, rejecting a proposal that ex parte contact issues be resolved preemptively under CR 26(c), governing protective orders. To the extent Ford v. Chaplin and Rowe v. Vaagen Bros. Lumber, Inc. hold otherwise, they should be disapproved.

V. ARGUMENT

A.) Background Regarding *Loudon* And Subsequent Washington Cases Interpreting The Ex Parte Contact Prohibition.

Twenty-two years ago, in a medical negligence wrongful death action not unlike this case, this Court, in a unanimous opinion, established the Loudon rule. The rule prohibits any ex parte contact between defense counsel and a plaintiff's treating physician. See Loudon, 110 Wn.2d at 681. In Loudon, the physician-patient privilege had been waived and defense counsel sought advance permission from the trial court to engage in ex parte communications with one of the decedent's treating physicians. See id. at 675-76. The superior court denied the request, relying on Kime v. Niemann, 64 Wn.2d 394, 391 P.2d 955 (1964) (reversing order allowing defendant ex parte contact with treating physicians, finding formal discovery procedures adequate). See Loudon at 676. This Court granted discretionary review and affirmed, imposing the ex parte prohibition on public policy grounds. See id. at 677.

The holding in Loudon is based on a number of considerations. First, the Court recognized that, notwithstanding waiver of the physician-patient privilege, ex parte interviews carry the potential for disclosure of irrelevant privileged information. See id. at 678.[5]

[5] At the time of Loudon, the physician-patient privilege was deemed waived as to conditions at issue in the particular litigation. See 110 Wn.2d at 677-78 (and cases cited

Second, the Court voiced concern about the potential that ex parte contact with a treating physician may result in a civil action against the physician for inadvertent wrongful disclosure of irrelevant information. See id. at 680.

Third, the Court noted that ex parte interviews could result in disputes at trial, should the physician's testimony differ from informal statements to defense counsel, thereby requiring defense counsel to become an impeachment witness. See id.

Finally, in what is by far the most prominent justification for adopting the ex parte prohibition, this Court recognized that unauthorized ex parte contact could potentially undermine the physician-patient relationship itself. See id. at 679-81. It concluded:

> *Wright v. Group Health Hosp.* [103 Wn.2d 192, 691 P.2d 564 (1984)], was not concerned with the fiduciary confidential relationship which exists between physician and patient. The unique nature of the physician-patient relationship and the dangers which ex parte interviews pose justify the direct involvement of counsel in any contact between defense counsel

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therein). The waiver was not absolute, but limited to medical information relevant to the case. See id.; CR 26(b)(1). Now, under RCW 5.60.060(4)(b), the privilege is deemed waived 90 days after filing of a personal injury or wrongful death action for all physicians and conditions, "subject to such limitations as a court may impose pursuant to court rules." Consequently, even today CR 26(b)(1) limits the scope of waiver of the testimonial privilege. (The full text of the current version of RCW 5.60.060 is reproduced in the Appendix to this brief.)

Other statutory restrictions also exist limiting the circumstances under which physicians and other health care providers may share privileged information with others. See e.g. Uniform Health Care Information Act, Ch. 70.02 RCW. The legislative findings underlying this act, codified in RCW 70.02.005, are reproduced in the Appendix to this brief.

> and a plaintiff's physician. Similarly, [Washington State Bar Association Formal] Ethics Opinion 180 states only that ex parte contact with physicians is not unethical, but it does not address the policy concerns which militate against such contact.
>
> We hold that defense counsel may not engage in ex parte contact with a plaintiff's physicians.

Id. at 681-82.[6]

In prohibiting ex parte contact, this Court addressed and rejected two arguments by the defense. First, it found that whatever hardship might follow from requiring defendants to use formal discovery procedures was outweighed by the potential risks involved in ex parte contacts. See id. at 680. Second, the Court rejected the proposal that ex parte contact ought to be permissible unless the plaintiff in the particular case sought a protective order under CR 26(c) based upon good cause:

> [W]e foresee that a protective order would usually be sought by plaintiff's counsel which would involve the court system in supervision of every such situation. We reject such a procedure.

Id. at 679.

Of course, the Court in Loudon did not address the consequences of a violation of the ex parte contact prohibition because no inappropriate

[6] *After* Loudon, an unauthorized ex parte contact may be unethical under RPC 3.4(c) (knowingly disobeying a tribunal rule) and RPC 8.4(d) (engaging in conduct prejudicial to the administration of justice).

contact had occurred, as defense counsel were seeking advance permission for such contact. See 110 Wn.2d at 676.

Since Loudon, this Court has revisited the ex parte contact rule on two occasions. In Holbrook v. Weyerhaeuser Company, 118 Wn.2d 306, 822 P. 2d 271 (1992), it held that the ex parte prohibition did not apply to worker's compensation administrative claims:

> In sum, in the context of industrial insurance claims, the Legislature has specifically addressed the concerns raised in *Loudon* and advised this court of the need for easier, less formal, economical procedures. Accordingly, we hold that *Loudon* does not apply in the context of industrial insurance claims.

Id., 118 Wn.2d at 313.[7]

Subsequently, in Carson v. Fine, 123 Wn.2d 206, 867 P.2d 610 (1994), the Court upheld the right of defense counsel to call a treating physician at trial and elicit his or her opinions regarding whether plaintiff's care by another physician was negligent. The majority opinion in Carson recognized the Loudon rule but found it inapplicable under the circumstances; it also noted, in dicta, that the rule was not violated in any event. See Carson, 123 Wn.2d at 227. The majority opinion described Loudon as holding "defense counsel may not communicate ex parte with a

[7] The holding in Holbrook has been superseded, effective July 26, 2009, by enactment of a new section to Ch. 51.52 RCW, which restricts ex parte contact with a worker's treating physician. See 2009 Laws, ch. 391 §1 (codified as RCW 51.52.063). The current version of RCW 51.52.063 is reproduced in the Appendix to this brief.

plaintiff's treating physician but *must use formal discovery procedures.*" Carson at 227 (emphasis added).

Three Court of Appeals opinions have interpreted Loudon, including Division I's opinion below. In Ford v. Chaplin, 61 Wn.App. 896, 812 P.2d 532, *review denied*, 117 Wn.2d 1026 (1991), Division I found Loudon was violated but determined the error was harmless. In Ford, a personal injury action, the trial court authorized defense counsel to have ex parte contact with one of plaintiff's treating physicians, but ordered that there would be no discussions regarding confidentialities or privileged matters not disclosed through discovery. See 61 Wn.App. at 898. This ex parte contact was justified on the basis that it was necessary for trial preparation of the physician as a defense witness. See id. The Court of Appeals held the trial court erred in allowing the ex parte contact, concluding "[w]e do not read *Loudan* [sic] to allow room for ex parte contact, even when so characterized." Id. Nonetheless, the Court of Appeals found the error harmless because the record on appeal did not permit it to determine whether the ex parte contact materially prejudiced plaintiff's case. See id. at 899.

In Rowe v. Vaagen Bros. Lumber, Inc., 100 Wn.App. 268, 996 P.2d 1103 (2000), a retaliatory discharge action, Division III held that defense counsel's ex parte contact with the employee's physician violated

Loudon, and that the trial court did not abuse its discretion in granting a new trial for this and other reasons. The court held that even if the plaintiff waived the physician-patient privilege, the Loudon prohibition remained and the ex parte contact violated the discovery rules. See Rowe, 100 Wn.App. at 279. The Court of Appeals concluded that because the trial court had found the ex parte contact had prejudiced plaintiff Rowe, this alone required a new trial. See id. at 278-80.

Lastly, as discussed supra at 4, the Court of Appeals below found that defense counsel's ex parte contact via the treating physician's lawyer did not constitute a Loudon violation, and that, in any event, there was no showing of prejudice that required striking the physician's testimony or a mistrial/new trial. See Smith, 149 Wn.App. at 341-44. The court specifically rejected Smith's argument that Loudon "established a bright line rule prohibiting all contact and deeming any prohibited contact prejudicial per se." Id. at 341.

This appeal provides the Court with an opportunity to clarify whether the ex parte prohibition in Loudon is a bright line rule that includes contact through an intermediary, and whether any Loudon violation is deemed prejudicial per se, or is subject to a case-by-case prejudice analysis. These questions are addressed below.

B.) *Loudon* Is A Bright Line Rule Prohibiting *Any* Ex Parte Contact By Defense Counsel With Plaintiff's Treating Physicians, Including Contact Made Through An Intermediary.

Loudon represents a broad and sweeping condemnation of *any* contact between defense counsel and a plaintiff's treating physicians outside of the formal discovery process. See 110 Wn.2d at 681; see also Carson, 123 Wn.2d at 227.

In Loudon, this Court concludes:

> The unique nature of the physician-patient relationship and the dangers ex parte interviews pose justify the direct involvement of [plaintiff's] counsel *in any contact* between defense counsel and plaintiff's physician.

110 Wn.2d at 681 (emphasis added).

This language alone suggests a bright line rule. While a principal concern centers around ex parte interviews with treating physicians, the holding is much more expansive than that context alone.

This reading of Loudon is further supported by the fact that the Court's analysis ranges far beyond the confines of the particular facts before the court, a wrongful death action where no ongoing physician-patient relationship existed. See id. at 676. Orthopedics International questions this rationale for the Loudon rule in a wrongful death context, where there is no ongoing physician-patient relationship. See Orthopedics International Ans. to Pet. for Rev. at 17 n.14. This criticism fails to

appreciate that in addressing this issue the Court intended to craft a policy-based rule designed to preserve the physician-patient relationship in a myriad of contexts, and not just based on the facts of a particular case.

In crafting its broad and unyielding formulation, the Court was also mindful that anything less than a categorical prohibition would tax trial court resources, thereby disserving judicial economy. See id. at 679 (rejecting proposal for handling ex parte contact issues under the CR 26(c) protective order mechanism).

The notion of a bright line rule is carried forward in Carson v. Fine, which states clearly that under Loudon "defense counsel may not communicate ex parte with a plaintiff's treating physicians, but must use formal discovery procedures." See 123 Wn.2d at 227.

In seeking to avoid the effect of Loudon, Orthopedics International argues that Loudon only prohibits direct ex parte contact with treating physicians, not contacts via the treating physician's lawyer. See Orthopedics International Ans. to Pet. for Rev. at 13 (arguing Loudon does not prohibit "communication between lawyers acting as lawyers"). The problem with this argument is twofold. First, it overlooks Loudon's proscription of "any contact." See 110 Wn.2d at 681. This language contemplates direct or indirect contact. Second, the lawyer for the *plaintiff* is not involved, and absent his or her involvement, the same

potential for a "chilling effect" on the physician-patient relationship exists. See id. at 679. While the involvement of the treating physician's lawyer arguably may provide some additional safeguard against any actual mischief, the potential for a chilling effect on the physician-patient relationship remains. See id. (recognizing "mere threat" of improper communications may chill physician-patient relationship). For this reason, it should not matter if the actual communications are determined, after the fact, to be benign.[8] Thus, Orthopedic International's argument that because the actual communications here only involved public documents the contact is harmless misses the mark. See Orthopedics International Ans. to Pet. for Rev. at 15. The potential adverse impact on the physician-patient relationship may be subtle in this instance, but it is no less harmful.

For all of the foregoing reasons, the Loudon rule must be a categorical one in order to fully protect the public policy of exalting the physician-patient relationship in the myriad of contexts in which it operates. This relationship is not only fiduciary, see Loudon at 679, it is also one that by its very nature profoundly affects a person's health and well being. In "The Healing Heart," Normal Cousins, long time editor of

[8] Even with seemingly benign ex parte contact there is also the risk that the treating physician's response to the contact may disserve the physician-patient relationship.

Saturday Review, speaks knowingly, as a patient, about the importance of the physician-patient relationship to the healing process:

> There are qualities beyond pure medical competence that patients need and look for in their doctors. They want reassurance. They want to be looked after and not just looked over. They want to be listened to. They want to feel that it makes a difference to the physician, a very big difference, whether they live or die. They want to feel that they are in the doctor's thoughts. In short, patients are a vast collection of emotional needs. Yes, psychological counselors are very helpful in this connection - - and so are family and clergy. But the patient turns most of all and first of all to the physician. It is the physician who has most to offer in terms of those emotional needs. It is the person of the doctor and the presence of the doctor - - just as much as, and frequently more than, what the doctor does - - that create an environment for healing. The physician represents restoration. The physician holds the lifeline. The physician's words and not just his prescriptions are attached to that lifeline.
>
> This aspect of medicine has not changed in thousands of years. Not all the king's horses and all the king's men - - not all the tomography and thallium scanners and 2-D echograms and medicinal mood modifiers - - can pre-empt the physician's primary role as the keeper of the keys to the body's own healing system.

Norman Cousins, The Healing Heart, at 136-37 (W.W. Norton & Co. 1983).

This relationship is sacred, and should not be unduly threatened by ex parte contacts of any kind with a treating physician. The Court should reaffirm the categorical and unyielding nature of the Loudon rule.[9]

[9] Recognizing Loudon is a bright line rule is wholly consistent with RCW 70.02.060, the current version of which is reproduced in the Appendix to this brief. This provision of

C.) Any Violation Of The *Loudon* Rule Should Be Deemed Prejudicial Per Se Given The Potential For Harm To The Physician-Patient Relationship, And At Minimum Should Prevent The Defense From Using The Physician's Testimony For Its Purposes.

Upon Smith's discovery of defense counsel's contact with Dr. Johansen through his lawyer, Smith unsuccessfully moved to strike Dr. Johansen's testimony and for mistrial. Following a defense verdict, a motion for new trial on the same grounds was denied. The trial court and Court of Appeals below found no Loudon rule violation. See supra at 3-4. In dicta, the Court of Appeals also concluded that the record did not reflect prejudice in any event. See Smith, 149 Wn.App. at 343. Two other Court of Appeals opinions, Ford, supra, and Rowe, supra, suggest the remedy or sanction for a Loudon rule violation involves a case-by-case assessment, based upon an actual prejudice analysis. If this Court finds the Loudon rule was violated by the contact involved here, it must address how trial courts should deal with such violations.

Any unauthorized ex parte contact by defense counsel with a treating physician should be deemed prejudicial per se and the remedy or sanction, like the rule itself, should be categorical to assure maximum protection for the physician-patient relationship. At a minimum, the

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the Uniform Health Care Information Act imposes substantial limitations on the manner in which health care information is obtained from a physician.

defense should not be permitted to use the testimony of the treating physician for its purposes. Additional relief may be necessary under the facts and circumstances of the particular case. This approach is necessary because the Loudon rule is grounded in public policy concerns that transcend the question of whether the particular discovery proceedings or trial were infected by the misconduct. The rule is designed to protect the physician-patient relationship itself, which may well endure long after the particular legal controversy has come to an end.

Advance knowledge by defense counsel of the exact consequences of a Loudon rule violation will maximize the deterrent effect of the rule. This imposition of an across-the-board consequence is in keeping with the general principle applied to levying sanctions for discovery violations; that is, that in imposing the "least severe sanction" the sanction needs to "be severe enough to deter...attorneys and others from participating in this kind of conduct in the future." Washington Physicians Ins. Exch. v. Fisons Corp., 122 Wn.2d 299, 356, 858 P.2d 1054 (1998). Here, deterrence should be the primary concern.

This approach is also supported by practical considerations. Loudon eschewed a case-by-case resolution of the ex parte contact issue under the protective order mechanism of CR 26(c). See 110 Wn.2d at 679. The Court did not want trial courts embroiled in skirmishes

involving this issue. It stands to reason that this same concern for judicial economy should militate against requiring post hoc hearings to explore the consequences of a Loudon violation in every case.[10]

For the foregoing reasons, at minimum, a Loudon rule violation should render testimony of the treating physician involved off limits to the defense. A case-by-case analysis of the consequences of a Loudon violation will not sufficiently deter such misconduct, and would also unduly tax the resources of trial courts. (The trial court may have to conduct a hearing to determine whether the plaintiff is entitled to any additional relief.) To the extent Ford, supra and Rowe, supra hold otherwise, they should be disapproved.

VI. CONCLUSION

The Court should affirm the bright line nature of the Loudon rule and clarify that the minimum remedy or sanction for a violation is to prevent the defense from using the testimony of the treating physician for its purposes.

DATED this 25th day of May, 2010.

Bryan C. Harnetiaux *
BRYAN P. HARNETIAUX

George M. Ahrend by Bryan C. Harnetiaux with authority *
GEORGE M. AHREND

[10] As noted supra at 3-4, here the alleged Loudon rule violation surfaced mid-trial, resulting in a weekend telephone conference between the trial court and counsel, including additional legal counsel for the occasion, along with a follow-up hearing after the trial resumed.

DAVID P. GARDNER On behalf of WSAJ Foundation

*Brief transmitted for filing by email; signed original retained by counsel.

Appendix

RCW 5.60.060. Who are disqualified--Privileged communications

(1) A spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner; nor can either during marriage or during the domestic partnership or afterward, be without the consent of the other, examined as to any communication made by one to the other during the marriage or the domestic partnership. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, nor to a criminal action or proceeding against a spouse or domestic partner if the marriage or the domestic partnership occurred subsequent to the filing of formal charges against the defendant, nor to a criminal action or proceeding for a crime committed by said spouse or domestic partner against any child of whom said spouse or domestic partner is the parent or guardian, nor to a proceeding under chapter 70.96A, 70.96B, 71.05, or 71.09 RCW: PROVIDED, That the spouse or the domestic partner of a person sought to be detained under chapter 70.96A, 70.96B, 71.05, or 71.09 RCW may not be compelled to testify and shall be so informed by the court prior to being called as a witness.

(2)(a) An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.

(b) A parent or guardian of a minor child arrested on a criminal charge may not be examined as to a communication between the child and his or her attorney if the communication was made in the presence of the parent or guardian. This privilege does not extend to communications made prior to the arrest.

(3) A member of the clergy, a Christian Science practitioner listed in the Christian Science Journal, or a priest shall not, without the consent of a person making the confession or sacred confidence, be examined as to any confession or sacred confidence made to him or her in his or her professional character, in the course of discipline enjoined by the church to which he or she belongs.

(4) Subject to the limitations under RCW 70.96A.140 or 71.05.360 (8) and (9), a physician or surgeon or osteopathic physician or surgeon or podiatric physician or surgeon shall not, without the consent of his or her

patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him or her to prescribe or act for the patient, except as follows:

(a) In any judicial proceedings regarding a child's injury, neglect, or sexual abuse or the cause thereof; and

(b) Ninety days after filing an action for personal injuries or wrongful death, the claimant shall be deemed to waive the physician-patient privilege. Waiver of the physician-patient privilege for any one physician or condition constitutes a waiver of the privilege as to all physicians or conditions, subject to such limitations as a court may impose pursuant to court rules.

(5) A public officer shall not be examined as a witness as to communications made to him or her in official confidence, when the public interest would suffer by the disclosure.

(6)(a) A peer support group counselor shall not, without consent of the law enforcement officer or firefighter making the communication, be compelled to testify about any communication made to the counselor by the officer or firefighter while receiving counseling. The counselor must be designated as such by the sheriff, police chief, fire chief, or chief of the Washington state patrol, prior to the incident that results in counseling. The privilege only applies when the communication was made to the counselor while acting in his or her capacity as a peer support group counselor. The privilege does not apply if the counselor was an initial responding officer or firefighter, a witness, or a party to the incident which prompted the delivery of peer support group counseling services to the law enforcement officer or firefighter.

(b) For purposes of this section, "peer support group counselor" means a:

(i) Law enforcement officer, firefighter, civilian employee of a law enforcement agency, or civilian employee of a fire department, who has received training to provide emotional and moral support and counseling to an officer or firefighter who needs those services as a result of an incident in which the officer or firefighter was involved while acting in his or her official capacity; or

(ii) Nonemployee counselor who has been designated by the sheriff, police chief, fire chief, or chief of the Washington state patrol to provide emotional and moral support and counseling to an officer or firefighter who needs those services as a result of an incident in which the officer or firefighter was involved while acting in his or her official capacity.

(7) A sexual assault advocate may not, without the consent of the victim, be examined as to any communication made between the victim and the sexual assault advocate.

(a) For purposes of this section, "sexual assault advocate" means the employee or volunteer from a rape crisis center, victim assistance unit, program, or association, that provides information, medical or legal advocacy, counseling, or support to victims of sexual assault, who is designated by the victim to accompany the victim to the hospital or other health care facility and to proceedings concerning the alleged assault, including police and prosecution interviews and court proceedings.

(b) A sexual assault advocate may disclose a confidential communication without the consent of the victim if failure to disclose is likely to result in a clear, imminent risk of serious physical injury or death of the victim or another person. Any sexual assault advocate participating in good faith in the disclosing of records and communications under this section shall have immunity from any liability, civil, criminal, or otherwise, that might result from the action. In any proceeding, civil or criminal, arising out of a disclosure under this section, the good faith of the sexual assault advocate who disclosed the confidential communication shall be presumed.

(8) A domestic violence advocate may not, without the consent of the victim, be examined as to any communication between the victim and the domestic violence advocate.

(a) For purposes of this section, "domestic violence advocate" means an employee or supervised volunteer from a community-based domestic violence program or human services program that provides information, advocacy, counseling, crisis intervention, emergency shelter, or support to victims of domestic violence and who is not employed by, or under the direct supervision of, a law enforcement agency, a prosecutor's office, or the child protective services section of the department of social and health services as defined in RCW 26.44.020.

(b) A domestic violence advocate may disclose a confidential communication without the consent of the victim if failure to disclose is likely to result in a clear, imminent risk of serious physical injury or death of the victim or another person. This section does not relieve a domestic violence advocate from the requirement to report or cause to be reported an incident under RCW 26.44.030(1) or to disclose relevant records relating to a child as required by RCW 26.44.030(12). Any domestic violence advocate participating in good faith in the disclosing of communications under this subsection is immune from liability, civil, criminal, or otherwise, that might result from the action. In any proceeding, civil or criminal, arising out of a disclosure under this subsection, the good faith of the domestic violence advocate who disclosed the confidential communication shall be presumed.

(9) A mental health counselor, independent clinical social worker, or marriage and family therapist licensed under chapter 18.225 RCW may not disclose, or be compelled to testify about, any information acquired from persons consulting the individual in a professional capacity when the information was necessary to enable the individual to render professional services to those persons except:

(a) With the written authorization of that person or, in the case of death or disability, the person's personal representative;

(b) If the person waives the privilege by bringing charges against the mental health counselor licensed under chapter 18.225 RCW;

(c) In response to a subpoena from the secretary of health. The secretary may subpoena only records related to a complaint or report under RCW 18.130.050;

(d) As required under chapter 26.44 or 74.34 RCW or RCW 71.05.360 (8) and (9); or

(e) To any individual if the mental health counselor, independent clinical social worker, or marriage and family therapist licensed under chapter 18.225 RCW reasonably believes that disclosure will avoid or minimize an imminent danger to the health or safety of the individual or any other individual; however, there is no obligation on the part of the provider to so disclose.

[2009 c 424 § 1, eff. July 26, 2009; 2008 c 6 § 402, eff. June 12, 2008; 2007 c 472 § 1, eff. July 22, 2007. Prior: 2006 c 259 § 2, eff. June 7, 2006; 2006 c 202 § 1, eff. June 7, 2006; 2006 c 30 § 1, eff. June 7, 2006; 2005 c 504 § 705, eff. July 1, 2005; 2001 c 286 § 2; 1998 c 72 § 1; 1997 c 338 § 1; 1996 c 156 § 1; 1995 c 240 § 1; 1989 c 271 § 301; prior: 1989 c 10 § 1; 1987 c 439 § 11; 1987 c 212 § 1501; 1986 c 305 § 101; 1982 c 56 § 1; 1979 ex.s. c 215 § 2; 1965 c 13 § 7; Code 1881 § 392; 1879 p 118 § 1; 1877 p 86 § 394; 1873 p 107 § 385; 1869 p 104 § 387; 1854 p 187 § 294; RRS § 1214. Cf. 1886 p 73 § 1.]

RCW 70.02.005. Findings

The legislature finds that:

(1) Health care information is personal and sensitive information that if improperly used or released may do significant harm to a patient's interests in privacy, health care, or other interests.

(2) Patients need access to their own health care information as a matter of fairness to enable them to make informed decisions about their health care and correct inaccurate or incomplete information about themselves.

(3) In order to retain the full trust and confidence of patients, health care providers have an interest in assuring that health care information is not improperly disclosed and in having clear and certain rules for the disclosure of health care information.

(4) Persons other than health care providers obtain, use, and disclose health record information in many different contexts and for many different purposes. It is the public policy of this state that a patient's interest in the proper use and disclosure of the patient's health care information survives even when the information is held by persons other than health care providers.

(5) The movement of patients and their health care information across state lines, access to and exchange of health care information from automated data banks, and the emergence of multistate health care providers creates a compelling need for uniform law, rules, and procedures governing the use and disclosure of health care information.

[1991 c 335 § 101.]

RCW 51.52.063. After notice of appeal--Contact with medical providers restricted--Rules

(1)(a) Except as provided in (b) through (d) of this subsection, after receipt of the notice of an appeal that has been filed under RCW 51.52.060(2), the employer and its representatives shall not have contact to discuss the issues in question in the appeal with any medical provider who has examined or treated the worker at the request of the worker or treating medical provider, unless written authorization for contact is given by the worker or the worker's representative. Written authorization is only valid if given after the date that the appeal is filed and expires ninety days after it is signed.

(b) Contact is permitted as necessary for the ongoing management of the claim, including but not limited to communication regarding the worker's treatment needs and the provider's treatment plan, vocational and return-to-work issues and assistance, and certification of the worker's inability to work, unless these issues are in question in the appeal.

(c) If the employer or its representatives wish to communicate with the examining or treating medical providers concerning the issues in question in the appeal, and no written authorization from the worker or the worker's representative has been obtained, the communication must either be:

(i) In writing, including by e-mail, sent contemporaneously to all parties with a distinct notice to the provider that any response must be in writing, including by e-mail;

(ii) In person, by telephone, or by videoconference, at a date and time mutually agreed to by all parties, with the worker or the worker's representative given the opportunity to fully participate; or

(iii) Pursuant to a properly scheduled and noted deposition.

(d) Written authorization is not required if the worker fails to identify or confirm the examining or treating medical provider as a witness as required by the board.

(2)(a) Except as provided in (b) and (c) of this subsection, after receipt of the notice of an appeal under RCW 51.52.060(2), the worker and the

representative for the worker, if any, shall not have contact to discuss the issues in question in the appeal with any medical provider who has examined the worker at the request of the employer pursuant to RCW 51.36.070, unless written authorization for contact is given by the employer or its representative. Written authorization is only valid if given after the date that the appeal is filed and expires ninety days after it is signed.

(b) If the worker or the worker's representative wishes to communicate with a medical provider who has examined the worker pursuant to RCW 51.36.070, and no written authorization from the employer or its representative has been obtained, the communication must either be:

(i) In writing, including by e-mail, sent contemporaneously to all parties with a distinct notice to the provider that any response must be in writing, including by e-mail;

(ii) In person, by telephone, or by videoconference, at a date and time mutually agreed to by all parties, with the department, employer, and their representatives given the opportunity to fully participate; or

(iii) Pursuant to a properly scheduled and noted deposition.

(c) Written authorization is not required if the employer fails to identify or confirm the examining medical provider as a witness as required by the board.

(3) Subsections (1) and (2) of this section do not apply to the department.

(a) Except as provided in (b) through (d) of this subsection, after an appeal has been filed under RCW 51.52.060(2), a conference has been held to schedule hearings, and the worker has named his or her witnesses, the department and its representatives shall not have contact to discuss the issues in question in the appeal with any medical provider who has examined or treated the worker at the request of the worker or treating medical provider and has been named as a witness by the worker or their representative unless written authorization for contact is given by the worker or the worker's representative. Written authorization is only valid if given after the date that the appeal is filed and expires ninety days after it is signed.

(b) Contact is permitted as necessary for the ongoing management of the claim, including but not limited to communication regarding the worker's treatment needs and the provider's treatment plan, vocational and return-to-work issues and assistance, and certification of the worker's inability to work, unless these issues are in question in the appeal.

(c) If the department or its representatives wish to communicate with the examining or treating medical providers concerning the issues in question in the appeal, and no written authorization from the worker or the worker's representative has been obtained, the communication must either be:

(i) In writing, including by e-mail, sent contemporaneously to all parties with a distinct notice to the provider that any response must be in writing, including by e-mail;

(ii) In person, by telephone, or by videoconference, at a date and time mutually agreed to by all parties, with the worker or the worker's representative given the opportunity to fully participate; or

(iii) Pursuant to a properly scheduled and noted deposition.

(d) Written authorization is not required if the worker fails to identify or confirm the examining or treating medical provider as a witness as required by the board.

(4)(a) Except as provided in (b) and (c) of this subsection, after an appeal has been filed under RCW 51.52.060(2), a conference has been held to schedule hearings, and the worker has named his or her witnesses, the worker and the representative for the worker, if any, shall not have contact to discuss the issues in question in the appeal with any medical provider who has examined the worker at the request of the department pursuant to RCW 51.36.070, unless written authorization for contact is given by the department or its representatives. Written authorization is only valid if given after the date that the appeal is filed and expires ninety days after it is signed.

(b) If the worker or the worker's representative wishes to communicate with a medical provider who has examined the worker pursuant to RCW 51.36.070, and no written authorization from the department or its representative has been obtained, the communication must either be:

(i) In writing, including by e-mail, sent contemporaneously to all parties with a distinct notice to the provider that any response must be in writing, including by e-mail;

(ii) In person, by telephone, or by videoconference, at a date and time mutually agreed to by all parties, with the department or its representatives given the opportunity to fully participate; or

(iii) Pursuant to a properly scheduled and noted deposition.

(c) Written authorization is not required if the department fails to identify or confirm the examining medical provider as a witness as required by the board.

(5) Upon motion by either party, the industrial appeals judge assigned to the case may determine whether a party has made itself reasonably available to participate in an in-person, telephone, or videoconference communication as provided in subsections (1)(c)(ii), (2)(b)(ii), (3)(c)(ii), and (4)(b)(ii) of this section. If the industrial appeals judge determines that a party has not made itself reasonably available, the judge may determine appropriate remedies including but not limited to setting a date and time for the contact being requested by a party, sanctioning the party who has not reasonably made itself available, or both.

(6) This section only applies to issues set forth in a notice of appeal under RCW 51.52.060(2).

(7) This section does not limit the reporting requirements under RCW 51.04.050 and 51.36.060 for issues not set forth in a notice of appeal.

(8) The department and board may adopt rules as necessary to implement the provisions of this section.

(9) A medical provider who discusses issues on appeal with the department or with any employer or worker or representative of any employer or worker in violation of this section shall not be held liable for such communication.

[2009 c 391 § 1, eff. July 26, 2009.]

RCW 70.02.060. Discovery request or compulsory process

(1) Before service of a discovery request or compulsory process on a health care provider for health care information, an attorney shall provide advance notice to the health care provider and the patient or the patient's attorney involved through service of process or first-class mail, indicating the health care provider from whom the information is sought, what health care information is sought, and the date by which a protective order must be obtained to prevent the health care provider from complying. Such date shall give the patient and the health care provider adequate time to seek a protective order, but in no event be less than fourteen days since the date of service or delivery to the patient and the health care provider of the foregoing. Thereafter the request for discovery or compulsory process shall be served on the health care provider.

(2) Without the written consent of the patient, the health care provider may not disclose the health care information sought under subsection (1) of this section if the requestor has not complied with the requirements of subsection (1) of this section. In the absence of a protective order issued by a court of competent jurisdiction forbidding compliance, the health care provider shall disclose the information in accordance with this chapter. In the case of compliance, the request for discovery or compulsory process shall be made a part of the patient record.

(3) Production of health care information under this section, in and of itself, does not constitute a waiver of any privilege, objection, or defense existing under other law or rule of evidence or procedure.

[1991 c 335 § 205.]